United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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IN THE

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

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No. 22226

Archie Blyther, Appellant

v.

United States of America, Appellee

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

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United States Court of Appeals
for the District of Columbia Circuit

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Statement of Questions Presented

1) The question is whether the evidence was sufficient to prove the corporate existence of Handley Ford, Inc.

2) The question is whether the evidence was sufficient to prove the ownership of the automobile by Handley Ford, Inc.

3) The question is whether the evidence was sufficient to prove non-consent on the part of Handley Ford, Inc. to the use of the vehicle in question.

4) The question is whether the instructions of the Court were so unintelligible and confusing as to prevent any reasonable resolution of the issues presented to the jury.

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* This case has not been previously before this Court.

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BRIEF FOR APPELLANT

Jurisdictional Statement

This is an appeal from a judgment of conviction and sentence by the United States District Court for the

District of Columbia on June 28, 1968. This Court has jurisdiction of the appeal pursuant to 28 U. S. C. 1291.

References and Rulings

None.

Statement of the Case

This is an appeal from a conviction of the Appellant (hereinafter referred to as Blyther) of the offense of Unauthorized Use of Vehicles (22 D. C. Code, Sect. 2204).

Charles Gottlieb was the first witness called by the government. He testified that he was employed by the Handley Ford Corporation, a body corporate as a used car manager and had been so employed for three years. (Tr. 25).

He testified that in February and March, 1967, that Handley Ford had a 1960 Convertible Thunderbird, and referring to his notes, gave its serial number as OY73Y14431. (Tr. 25, 26). In February, 1967, the car was kept at Handley's used car lot at 6322 Georgia Avenue, N. W., Washington, D. C., which lot was without barriers or guards. (Tr. 26).

On February 22, 1967, Handley intended to place a sticker on the car as a special for George Washington's Birthday sale and it was noticed that the car was missing. The next time

the car was seen by Handley was March 27, 1967, the day it was redeemed from the Sixth Precinct. (Tr. 27).

During the period February 22, 1967, to March 27, 1967, Gottlieb, nor anyone else, so far as he knew, gave no permission to Blyther, nor anyone else, to remove the car from Handley's lot. (Tr. 28, 30).

The car was reported as a loss to the police by another used car manager (Tr. 30), and within a day or two prior to the loss, five salesmen had been working on the lot. (Tr. 31).

Two officers, assigned to the Sixth Precinct, were on car patrol duty between the hours of midnight and eight o'clock A. M., the morning of March 27, 1967. (Tr. 32). They first observed the 1960 white Thunderbird near Kansas and Missouri Avenues passing through a red light. (Tr. 42). The car was later inspected and found to contain the same serial number testified to by Gottlieb. (Tr. 34). They gave chase for the car, and at one point during the chase, spotlighted the driver identified later as Blyther, but saw no passengers (Tr. 35, 36, 57). Thereafter, after further chase, they found the car in an alley with the keys in the car and the motor running. (Tr. 37). And, as they drove to the car, they observed Blyther walking nearby with a baby in his arms. (Tr. 58). Inside the car, they

found a portable radio and baby diapers. Subsequently, one fingerprint lifted from the portable radio was found not to be that of Blyther's. (Tr. 126).

After the chase and the inspection of the car, two officers went to a nearby building where they found Blyther and made an arrest. (Tr. 40).

Blyther, and supporting witnesses, disclosed by their testimony, that Blyther, with several of his children, visited in LaPlata, Maryland, the day and evening of March 26, 1967. (Tr. 76, 85, 90). Upon their return to Washington at about 11:30 P. M., Blyther, with his children, boarded a bus which they rode as passengers to their home. (Tr. 92, 93).

Statute Involved

22 D. C. Code, Section 2204. Unauthorized Use of Vehicles. Any person who, without the consent of the owner shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment. (Mar. 3, 1901 ch. 854 §826b, as added Feb. 3, 1913, 37 Stat. 656, ch. 23 §1.)

Statement of Points

I. The evidence was insufficient to support a conviction.

(a) The bare testimony of a used car manager of Handley Ford, Inc. that Handley Ford, Inc. is a body corporate is not proof of its corporate existence.

(b) The testimony of a used car manager of Handley Ford, Inc. that Handley had the automobile on its lot, is not proof of ownership in Handley.

(c) The bare testimony of a used car manager of Handley Ford, Inc. that he, nor anyone else, so far as he knew, during the period February 22, 1967 to March 27, 1967, gave permission to anyone to take the automobile from Handley's lot, is insufficient to prove that Blyther did not have permission to use the automobile in question.

II. The instruction of the Court that one element of the offense of "unauthorized use" is that the stolen automobile was driven for the defendant's own use or use or profit, followed by another statement that it was not necessary for the government to prove that the motor vehicle was used for the defendant's own use or profit, are contradictory and misleading.

Summary of Argument

1. Proof of the corporate existence of Handley Ford, Inc. offered through the testimony of a used car manager of Handley is insufficient. While corporate existence may be proved by parol evidence, it must be shown that the witness had a familiarity with the fact to be proven, i.e., the fact of corporate existence. The failure of the government to show such familiarity is fatal to its case.

2. The testimony of a used car manager that a 1960 Thunderbird was missing from the Handley used car lot, which is without barriers and guards, is not sufficient to prove ownership of the car in Handley and therefore, not a base for a finding of guilt on the part of Blyther.

3. The testimony of a used car manager that he did not give anyone permission to remove the car from the lot for the period February 22, 1967 to March 27, 1967, and so far as he knew, no one else did, is insufficient to prove non-consent, especially when Handley had at least another used car manager and five salesmen working on the lot.

4. The Court instructed the jury that one of the elements of the offense is that the automobile was driven or caused to be driven for the defendant's (Blyther) own use, or profit. Following this instruction the Court stated that 'It is not necessary for the government to prove that it was used for the defendant's own use or profit or for any length of time in this case. Since 'use' is an essential element of the offense, it was misleading to instruct that "use' must be proven, and thereafter to instruct that it was necessary. These two statements contained in the Court's instructions are so contradictory that the jury could not resolve the issue of 'use' before it.

ARGUMENT

Preliminary Statement

The burden was upon the government to prove Blyther was guilty beyond a reasonable doubt. This burden applies to every element of the offense charged. It is submitted that this burden was not met in that the government failed to prove that (1) Handley Ford was a body corporate; (2) Handley Ford, or anyone else, owned the vehicle in question; and (3) Blyther did not have permission to use the said vehicle. At the very best, the evidence was sketchy, unconvincing and inadequate to prove a crime against Blyther, whose very life and freedom is at stake in this case.

The government should and must be required to present the best evidence of the elements of the crime charged, and if it fails to do so, or fails to explain away its failure, then, a judgment of acquittal should be made.

This case is illustrative of this point, as the government did not offer credible evidence of the elements set forth above, and failed to explain away its omission. The span of life is too brief to allow it to be taken away by evidence so brief and without probative value as offered in this case.

All of the foregoing is more fully set out hereinafter.

I. The evidence was insufficient to support a conviction.

(a) The testimony of one of the used car managers of Handley Ford that Handley Ford, Inc. is a body corporate is not proof of its corporate existence.

The indictment charged Blyther with the unauthorized use of an automobile owned by Handley Ford, Inc., a body corporate. The only evidence bearing upon this issue was the testimony of Charles Gottlieb, a used car manager for Handley Ford. He was asked the following questions and gave the following answers:

"Q. What is your occupation?

A. A used car manager for Handley Ford Corp.

Q. Is that a body corporation?

A. Yes, it is." (TR25)

This testimony does not meet the test of proof of corporate existence provided for in Bimbo v. United States, 65 App. D. C. 246, 82 F.2d 852 (1936). The court, citing with approval state cases cited therein, said proof may be by (1) charter, (2) certificate of incorporation (3) license to do business (4) ratification or recognition of alleged corporation by an act of the legislature, or (5) by parol evidence.

In this case, no proof such as described above (1) through (4) was offered. Only the parol testimony of a used car manager was used to prove corporate existence. But the testimony of a used car manager falls short of the required proof, as Bimbo, supra requires proof by " . . . . parol evidence of an officer or other person acquainted with the fact." No officer having testified, nor any evidence elicited with respect to Gottlieb's familiarity with the corporation, the proof must fail. See also Bord v. United States, 76 App. D. C. 205, 133 F.2d 313 (1942).

(b) The testimony of a used car manager of Handley Ford, Inc. that Handley had the automobile on its lot, is not proof of ownership in Handley.

A simple statement by a used car manager, whom was not the only used car manager, that Handley had a 1960 Thunderbird, containing a certain serial number, for which number he referred to notes, on its unbarricaded, unguarded lot, is not evidence upon which the government should be permitted to rely to prove ownership. Especially does this hold when evidence of this nature is readily available to it to prove ownership beyond a reasonable doubt.

The government could have easily offered, if such evidence existed, a title to the car in question; or it could have called a responsible officer to testify as to how

the car was acquired and produced Handley's records to support his testimony.

The failure of the government to produce such evidence, readily available to it causes one to pause and wonder whether Handley owned the car in question, or whether it was content to rely upon such inconclusive evidence.

Proof of ownership beyond a reasonable doubt is required like other elements of the offense. Dixon v. United States, 110 App. D. C. 275, 292 F.2d 768 (1961); Dickson v. United States, 226 A.2d 364 (D. C. App. 1967).

(c) The bare testimony of a used car manager of Handley Ford, Inc., that he nor anyone else as far as he knew, during the period February 22, 1967, to March 27, 1967, gave permission to anyone to take the automobile from Handley's lot, is insufficient to prove that Blyther did not have permission to use the automobile in question.

Again, a simple statement by a used car manager, who was not the only used car manager, nor the only person authorized to permit the use of Handley's cars, if the car was, in fact, Handley's, is not sufficient to prove lack of permission. The utter lack of its probative value is demonstrated by the absence of any evidence showing that he made any investigation to determine whether any of the other salesmen, of which there are known to be at least five, permitted anyone to use the car.

Further, the car was parked upon an unbarricaded and unguarded lot upon which any person could have driven his car on to park or abandon the car. The latter is not unlikely for the car, allegedly used without permission, was seven years old at the time of the alleged unauthorized use of it.

The failure of the government to prove lack of permission by credible evidence from a responsible officer of Handley, as it failed to do on the issues of corporate existence and ownership, and to call on a used car manager

to prove these facts, leads to the conclusion that such evidence was unavailing. And in such a case as this, where a life is at stake, such skeletal evidence should not be permitted to be used as a sword to take it away.

Lack of permission or non-consent, like corporate existence and ownership must be proven beyond a reasonable doubt. A failure to so prove is fatal to the government's case. Johnson v. United States, 121 App. D. C. 19, 347 F.2d 803, (1965).

II. The instruction of the Court that one element of the offense of "unauthorized use" is that the stolen automobile was driven for the defendant's own use or profit followed by another statement that it was not necessary for the government to prove that the motor vehicle was used for the defendant's own use or profit are contradictory and misleading.

A defendant is entitled to a clear instruction from the Court as to each of the elements of the offense with which he is charged. Mills v. United States, 97 App. D. C. 131, 228 F.2d 645 (1955).

In this case, the Court recited the elements of the offense of "unauthorized use" and correctly stated that one of the elements of the offense is that the defendant must have used the stolen vehicle for his own use or profit.

Immediately following the recitation of the elements, the Court stated in contradiction to his previous statement that it was not necessary for the government to prove that the motor vehicle was used for the defendant's use.

The two statements could have only confused and misled the jury as one followed the other. The jury could not resolve from the two statements whether use was an essential element of the offense or not. Since use by the defendant for his own use or profit is an essential element of the offense, and the jury was improperly instructed on this element, the instructions were erroneous. Jackson v. United States, 121 App. D. C. 160, 348 F.2d 772 (1965); Mills v. United States supra.

CONCLUSION

It is, therefore, respectfully submitted that this Court reverse the judgment of conviction entered below, and direct the entry of a judgment of acquittal.

Respectfully submitted,

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